

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AMEREN TRANSMISSION COMPANY OF ILLINOIS)	
)	
Petition for a Certificate of Public Convenience and)	
Necessity, pursuant to Section 8-406.1 of the Illinois Public)	
Utilities Act, and an Order pursuant to Section 8-503 of the)	
Public Utilities Act, to Construct, Operate and Maintain a)	Docket No. 12-0598
New High Voltage Electric Service Line and Related)	
Facilities in the Counties of Adams, Brown, Cass,)	
Champaign, Christian, Clark, Coles, Edgar, Fulton, Macon,)	
Montgomery, Morgan, Moultrie, Pike, Sangamon, Schuyler,)	
Scott and Shelby, Illinois.)	

**AMEREN TRANSMISSION COMPANY OF ILLINOIS’ RESPONSE IN OPPOSITION
TO MOTION TO COMPEL OR IN THE ALTERNATIVE TO BAR TESTIMONY**

Intervenor Stop the Power Lines Coalition (“Stop the Power Lines”) asks this Commission to compel Ameren Transmission Company of Illinois (“ATXI”) to interpret, via discovery, the terms of a warranty easement deed and federal law, or to sanction ATXI for refusing to do so. Requests for legal conclusions are not, however, proper discovery; legal conclusions belong in briefing. Stop the Power Lines’ motion, moreover, is heavy on misrepresentations and light on law. It should be denied.

BACKGROUND

In evaluating Stop the Power Lines’ motion, it is important to look at what the data requests at issue actually ask. Stop the Power Lines claims it is seeking answers to questions about “whether [ATXI] can in fact build the only Primary Route through Clark County that: (1) ATXI has filed in this proceeding; and (2) for which ATXI has given the requisite notice to the potentially affected landowners.” (STPL Mtn. ¶ 10.) But a careful review shows that these are not the questions actually posed in the two data requests at issue. Stop the Power Lines issued five data requests to ATXI related to a federally-owned easement along ATXI’s proposed

Primary Route in Clark County, Illinois. Only two of these data requests are the subject of the motion at bar: STPL 4.02 and STPL 4.03. The Commission should be aware of what those data requests actually asked, and not merely what Stop the Power Lines wishes they had.

Stop the Power Lines claims STPL 4.02 asked ATXI “how it planned to construct” the Primary Route in Clark County given the terms of the Warranty Easement Deed. (STPL Mtn. ¶ 4.) That is inaccurate. What STPL 4.02 asked was whether ATXI “agree[d]” construction of the Primary Route on the easement property was inconsistent with the specific terms of a specific section of the deed:

STPL 4.02

Does ATXI agree that the proposed use of the property subject to the EWPP Floodplain Easement for construction of the Proposed Transmission Line is inconsistent with the Prohibitions specified in Part III.A. of the EWPP Floodplain Easement? If ATXI’s answer is anything other than an unqualified yes, please explain how ATXI plans to construct a transmission line without digging or destroying vegetative cover in violation of Subpart III.A.2. of the EWPP Floodplain Easement and building structures in the easement area in violation of Subpart III.A.7 of the Easement.

(STPL Mtn., Ex. 2, p. 3.) Likewise, Stop the Power Lines claims STPL 4.03 asked ATXI “how it planned” to acquire property rights superior to the easement given the terms of the Warranty Easement Deed and federal law. (STPL Mtn. ¶ 4.) That also is inaccurate. STPL 4.03 asked whether ATXI “contend[ed]” it could acquire such property rights given the terms of the deed and the (allegedly applicable) Code of Federal Regulations:

STPL 4.03

Does ATXI contend that it has the ability to acquire an easement on the land that is subject to the EWPP Floodplain Easement that is superior to the Easement or otherwise extinguishes the Easement? If ATXI’s answer is anything other than an unqualified no, please explain your answer in light of the provisions of the Easement itself and 7 C.F.R. §624.10, which is the applicable federal regulation governing floodplain easements acquired by United States, acting by and through the Natural Resources Conservation Service (“NRCS”).

(STPL Mtn., Ex. 2, p. 4.) In other words, the data requests Stop the Power Lines claims it asked were never, in fact, asked. Although Stop the Power Lines gratuitously describes the pertinent data requests as “designed . . . to explore *how* ATXI proposed to deal with the EWPP Floodplain Easement issues” (STPL Mtn. ¶ 1 (emphasis added)), only one data request came close to asking that question—STPL 4.04:

STPL 4.04

If ATXI is unable to acquire an easement on the land lying within the EWPP Floodplain Easement that is superior to the Easement, or to extinguish the Easement, can ATXI build its Proposed Transmission Line on the Primary Route between the Kansas substation and the Indiana State line? Please explain your answer.

(STPL Mtn., Ex. 2, p. 5.) ATXI answered that data request. It responded, “yes,” ATXI could build the Primary Route, and it provided a map showing how it would propose to do so. (*Id.*, pp. 5-6.) That response is not the subject of Stop the Power Lines’ motion.

ATXI could answer STPL 4.02 and STPL 4.03 only by requesting a legal conclusion from its counsel. Because these data requests effectively asked ATXI’s counsel to interpret the Warranty Easement Deed and the Code of Federal Regulations at 7 C.F.R. § 624.10, ATXI objected to both as improperly calling for a legal conclusion. ATXI also objected to the data requests as argumentative, given they simply assume construction of the Primary Route would violate the terms of the deed.

Rather than revise STPL 4.02 and STPL 4.03 or provide ATXI an explanation as to why Stop the Power Lines believes those requests are not objectionable, Stop the Power Lines filed the instant motion to compel answers from ATXI (or, perhaps, closer to the truth, its counsel). Noticeably absent from the motion, however, is *any* contention STPL 4.02 and STPL 4.03 do not

call for legal conclusions. To the contrary, Stop the Power Lines *concedes* ATXI's objections on this ground "might be technically correct. . . ." (STPL Mtn. ¶ 5.)

Nevertheless, Stop the Power Lines presses on. It asks the Commission to compel ATXI to answer the improper data requests based on arguments lacking any foundation in the law (and it cites none). It provides no explanation why it is entitled to ATXI's counsel's conclusions or the information it requests. It asks the Commission for radical alternative relief unwarranted by the facts—the preclusion of *any* testimony or legal argument "concerning interpretation" of the Warranty Easement Deed or how ATXI might construct the Primary Route to avoid the property described in the deed. And, in filing its motion, it disregards the Commission's Rules and those of the Illinois Supreme Court governing discovery motions. The Commission should deny Stop the Power Lines' unsupported and procedurally defunct motion.

ARGUMENT

A. STPL 4.02 and 4.03 Are Unquestionably Objectionable.

The Commission's rules regarding discovery "encourage voluntary exchange by the parties and staff witnesses of all relevant and material *facts* to a proceeding through the use of requests for documents and information." 83 Ill. Adm. Code § 200.340 (emphasis added). Discovery calling for legal interpretations or legal conclusions, however, is not appropriate. *P.R.S. Int'l v. Shred Pax Corp.*, 184 Ill. 2d 224, 236 (1998) ("[R]equests for legal conclusions are improper . . ."); *Nelson v. Pals*, 51 Ill. App. 2d 269, 275 (1st Dist. 1964) ("[I]nterrogatories calling for a conclusion on the part of the opponent or his counsel should not be used."); *Reske v. Klein*, 33 Ill. App. 2d 302, 306 (1st Dist. 1961) ("Since the answers [to interrogatories] may be used in evidence to the same extent as the deposition of an adverse party, it would be improper to permit an interrogatory to demand a conclusion.") In line with this, the Illinois Supreme Court

has held a discovery request to admit whether conduct breaches a contract is a legal, rather than factual, question, and is not appropriate discovery. *P.R.S.*, 184 Ill. 2d at 236-37. Pertinent to the motion at bar, the Court also has held the interpretation of an easement is a question of law.

Hahn v. County of Kane, 2012 IL App (2d) 110060 ¶ 12.

STPL 4.02 and STPL 4.03 expressly ask ATXI the legal question of whether construction of the Primary Route in Clark County across certain property is inconsistent with the terms of the Warranty Deed Easement and the Code of Federal Regulations. Because those requests ask ATXI to interpret an easement and the law, they ask for legal conclusions and are therefore improper. To the extent such interpretation issues must be addressed, briefing is the proper venue to do so. Stop the Power Lines' mischaracterizations of the requests in its motion do not cure their impropriety. Put simply, Stop the Power Lines could have asked data requests compliant with Illinois law. It did not.

B. Section 8-406.1 Does Not Make Objectionable Discovery Unobjectionable.

Stop the Power Lines concedes ATXI's objections to STPL 4.02 and STPL 4.03 "might be technically correct" (STPL Mtn. ¶ 5.) It argues, however, in this context, Section 8-406.1 of the Public Utilities Act (the "Act"), 220 ILCS 5/8-406.1, requires ATXI to answer objectionable discovery. That argument is absurd. Stop the Power Lines does not (and cannot) cite any legal authority in support of such contention. Nevertheless, Stop the Power Lines contends "ATXI cannot evade answering direct questions about *how it plans* to acquire federal government property interests on the Primary Route identified by ATXI in its Petition." (STPL Mtn. ¶ 5 (emphasis added).) But, again, STPL 4.02 and STPL 4.03 did not ask ATXI about its "plans." They asked for ATXI's interpretation of a Warranty Easement Deed and the Code of

Federal Regulations. Certainly nothing in Section 8-406.1 requires ATXI's witnesses or counsel to interpret legal documents or the law, or to provide legal conclusions, in discovery.

C. Stop the Power Lines Has Not Demonstrated It Is Otherwise Entitled to Information Regarding the Warranty Easement Deed.

The doctrine of “[s]tanding . . . requires some injury in fact to a legally recognized interest, and a prospective party cannot gain standing merely through a self-proclaimed concern about an issue, no matter how sincere.” *Landmarks Preservation Council v. Chicago*, 125 Ill. 2d 164, 175 (1988). While standing arises in many different contexts, the inquiry always comes back to whether the particular plaintiff has a personal interest in the specific claim being raised. “A party must assert its own legal rights and interests, rather than base a claim for relief upon the rights of third parties.” *Commercial Credit Loans v. Espinoza*, 293 Ill. App. 3d 923, 929 (1st Dist. 1997). When property rights are at issue, a legally enforceable interest in the affected property is essential. For example, in *Westwood Forum v. City of Springfield*, 261 Ill. App. 3d 911, 921-22 (4th Dist. 1994), the court affirmed a lower court holding that a pair of associations “did not have standing” to challenge a zoning decision. Even though the associations asserted “their individual members are owners of land adjacent to the property to be rezoned and whose property values will be diminished because of the rezoning,” the associations could not sue. *Id.* at 922. “[A]n association does not have standing based on its representational capacity alone . . . [but] must have a recognizable interest in the dispute which is peculiar to itself and capable of being affected.” *Id.* See also *Geja’s Cafe v. Metro. Pier & Exposition Auth.*, 153 Ill. 2d 239, 263 (1992) (“[A]s plaintiffs admit, none of them owns property within the site [affected by the challenged law]. Consequently, they do not have standing to raise the issue.”).

Stop the Power Lines acknowledges the United States government owns the easement that is the subject of the Warranty Easement Deed. (STPL Mtn. ¶ 1.) The deed identifies Leslie

Ann Robinson, Gregory T. Robinson, and Aimee Susan Janssen-Robinson as the owners of the property subject to the government's easement. (STPL Mtn., Ex. 1, p. 1.) Those individuals are not members of Stop the Power Lines. Stop the Power Lines has not alleged any of its members have any personal interest in the property described in the deed. In fact, they admit no members are grantors or grantees of the easement. (See Exhibit A (Stop the Power Lines' responses to ATXI-STPL 2.55 and 2.56).) Thus, construction of the Primary Route on the easement property does not affect Stop the Power Lines' property rights, and it has not demonstrated how construction of the Primary Route there would otherwise impact its rights. With no interest at stake in the easement property, Stop the Power Lines has not and cannot show it is entitled to information regarding construction near the easement, let alone ATXI's counsel's legal conclusions regarding the propriety of such construction in light of the terms of the Warranty Easement Deed and the Code of Federal Regulations.

D. The Alternative Relief Requested by Stop the Power Lines Is Not Appropriate.

“The purpose of [Illinois Supreme Court Rule 219(c)] discovery sanctions is to accomplish the required discovery, not to punish but to coerce recalcitrant parties to cooperate.” *Brandt v. John S. Tilley Ladders Co.*, 145 Ill. App. 3d 304, 306-37 (1st Dist. 1986); *Cronin v. Kottke Assocs., LLC*, 2012 IL App (1st) 111632 ¶ 35 (“Under Rule 219, the trial court must choose a sanction that will promote discovery, not impose punishment on a litigant.”) (citing *Wilkins v. T. Enterprises, Inc.*, 177 Ill. App. 3d 514, 517 (1st Dist. 1988)). A “just order under Rule 219(c) is one which, to the degree possible, ensures both discovery and trial on the merits.” *Cirrincone v. Westminster Gardens Limited P'ship*, 352 Ill. App. 3d 755, 765 (1st Dist. 2004) (citing *Wakefield v. Sears Roebuck & Co.*, 228 Ill. App. 3d 200, 226 (1st Dist. 1992)). Therefore, “[b]arring a witness from testifying is a drastic sanction for discovery abuses and

should be exercised sparingly.” *H & H Sand & Gravel Haulers Co. v. Coyne Cylinder Co.*, 260 Ill. App. 3d 235, 242 (2d Dist. 1994). “In considering whether it was appropriate to bar a witness’ testimony as a discovery sanction, courts must consider the conduct of the parties as well as the prejudicial impact of the testimony.” *Id.* at 247.

Stop the Power Lines alternatively requests that the Commission bar not only any testimony relating to ATXI’s response to STPL 4.04 (not a subject of STPL’s motion), but also *legal argument* relating to ATXI’s interpretation of the Warranty Easement Deed. (STPL Mtn. ¶ 11, Request for Relief.) Stop the Power Lines has not cited any legal basis for the extreme sanction it requests. Nor can it. ATXI properly objected to the data requests that are the subject of Stop the Power Lines’ motion—STPL 4.02 and 4.03—because they ask for legal conclusions. Stop the Power Lines has utterly failed to demonstrate those objections are misplaced; in fact, as discussed, it has conceded they may be “technically correct.” (*Id.* ¶ 5.) There is simply no conduct on ATXI’s behalf—let alone egregious conduct—that could serve as the basis to strike testimony relating to ATXI’s answer to an entirely separate data request, STPL 4.04. Moreover, legal argument, in brief, is *precisely* the place parties should offer their interpretations of the Warranty Easement Deed. As such, Stop the Power Lines’ request to preclude ATXI from offering in brief legal opinions it cannot offer in discovery is misplaced.

Stop the Power Lines’ real issue seems to be with the substance of ATXI’s answer to STPL 4.04, which, as stated, is not a subject of the instant request to compel. That data request asked “can ATXI build” the Primary Route in Clark County assuming it cannot cross the easement property. (STPL Mtn., Ex. 2, p. 5.) ATXI answered, “yes,” and showed how it could modify the Primary Route. (*Id.*, pp. 5-6.) Stop the Power Lines is not satiated. It makes much of the “modified route” in its motion, and contends that the modification “does not excuse ATXI

from answering questions whether it can in fact build the only Primary Route through Clark County that: (1) ATXI has filed in this proceeding; and (2) for which ATXI has given the notice to the potentially affected landowners.” (STPL Mtn. ¶¶ 9-10.) Again, Stop the Power Lines describes questions it never asked before filing its motion. (On April 16, 2013, the day after Stop the Power Lines filed its motion, it served on ATXI data requests asking precisely these questions. (*See* Exhibit B (STPL 5.1 – 5.3).) Further, it bears repeating that ATXI answered STPL 4.04; that data request is not the subject of Stop the Power Lines’ motion.

But taken to its logical conclusion, Stop the Power Lines appears to suggest that ATXI cannot propose modifications to its Primary and Alternate Routes. That argument effectively moots the purpose of this docketed proceeding. In other words, why would the Commission permit interested parties to intervene in this case and submit evidence on ATXI’s proposed routes if ATXI cannot evaluate and, where appropriate, make modifications? Despite Stop the Power Lines’ contentions to the contrary, Section 8-406.1 does not establish an “all or nothing” scenario. The Commission regularly adopts modifications to utilities’ proposed routes in certificate proceedings, and neither that Section, nor the Case Management Plan in this proceeding, precludes ATXI from evaluating and incorporating, where appropriate, suggested modifications to its routes.

E. Stop the Power Lines’ Motion Is Procedurally Deficient.

Illinois Supreme Court Rule 201(k) requires any motion asking the tribunal to intervene in the discovery process to include a statement that, after personal consultation, the parties were unable to resolve their discovery differences. Ill. S. Ct. R. 201(k). The Commission’s Rule 200.350 and the Case Management Plan entered by the Administrative Law Judges mirror that rule. 83 Ill. Adm. Code § 200.350; Notice of ALJs’ Ruling (Dec. 14, 2012). Strict compliance

with the rule is especially required where drastic relief is sought in the motion. *Brandt v. John S. Tilley Ladders Co.*, 145 Ill. App. 3d 304, 306 (1st Dist. 1986) (citing *Williams v. A. E. Staley Manufacturing Co.*, 83 Ill. 2d 559, 565 (1981); *Spiller v. Continental Tube Co.*, 95 Ill. 2d 423, 431 (1983); *Gallo v. Henke*, 107 Ill. App. 3d 21, 27 (1982)). The failure to include a statement in compliance with Rule 201(k) should result in dismissal of the motion. *Id.*

Stop the Power Lines' motion necessarily lacks any statement showing that consultation and reasonable attempts to resolve the parties' discovery differences have failed. Its motion alludes to a consultation, but it is anything but a reasonable one. Stop the Power Lines contends its counsel sent a single email to ATXI's counsel regarding STPL 4.02 and 4.03. (STPL Mtn. ¶ 6.) That email represented "[t]hese questions concern whether ATXI contends it can build its proposed transmission line on the Primary Route it has proposed in this proceeding." (STPL Mtn., Ex. 3, p. 1 (Apr. 2, 2013 email).) In response, ATXI's counsel pointed out that, in fact, STPL 4.04—and not STPL 4.02 and STPL 4.03—asked "can ATXI build its Proposed Transmission Line on the Primary Route," and that ATXI had already answered that question. (STPL Mtn. Ex. 2, p. 5, ¶ 8.) Yet, Stop the Power Lines' counsel neither clarified his representation regarding STPL 4.02 and STPL 4.03, nor explained why those data requests were not objectionable. Resolution was not otherwise attempted. Rather, Stop the Power Lines' next step was the Commission's e-Docket. It filed its motion to compel, asking the Commission to order ATXI to interpret the Warrant Easement Deed and federal law, as Stop the Power Lines had asked ATXI to do in STPL 4.02 and STPL 4.03. ATXI questions whether an email misrepresenting the discovery at issue, with no further follow-up or clarification, constitutes a "reasonable" attempt to resolve a discovery dispute.

CONCLUSION

Stop the Power Lines asks ATXI to interpret easement documents and to provide legal conclusions on the Code of Federal Regulations. Those interpretations and conclusions belong in legal brief, not discovery. Stop the Power Lines' meritless and procedurally deficient motion should be denied.

Dated: April 17, 2013

Respectfully submitted,

Ameren Transmission Company of Illinois

/s/ Anne M. Zehr

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CERTIFICATE OF SERVICE

I, Anne M. Zehr, an attorney, certify that on April 17, 2013, I caused a copy of the foregoing *Ameren Transmission Company of Illinois' Response in Opposition to Motion to Compel or in the Alternative to Bar Testimony* to be served by electronic mail to the individuals on the Commission's Service List for Docket 12-0598.

/s/ Anne M. Zehr

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